

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington DC 20554

In the Matter of	)	
	)	
	)	WC Docket No. 07-245
Implementation of Section 224 of the Act;	)	
Amendment of the Commission's Rules and	)	
Policies Governing Pole Attachments	)	
	)	

**REPLY COMMENTS OF FIBERTOWER CORPORATION**

FiberTower Corporation, pursuant to Section 1.415 of the Commission's Rules, hereby submits its reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM") in the above-captioned proceeding.<sup>1</sup> FiberTower supports clear, enforceable terms and timelines for making poles ready and accessible to *all* communications industry participants, whether they are common carriers, private carriers, or cable. This includes clearly stating that access is available on non-discriminatory terms to wireline, fixed wireless, and mobile wireless operators. The *NPRM* also directly implicates homeland security issues related to federal standards for physically diverse networks and thus network survivability.

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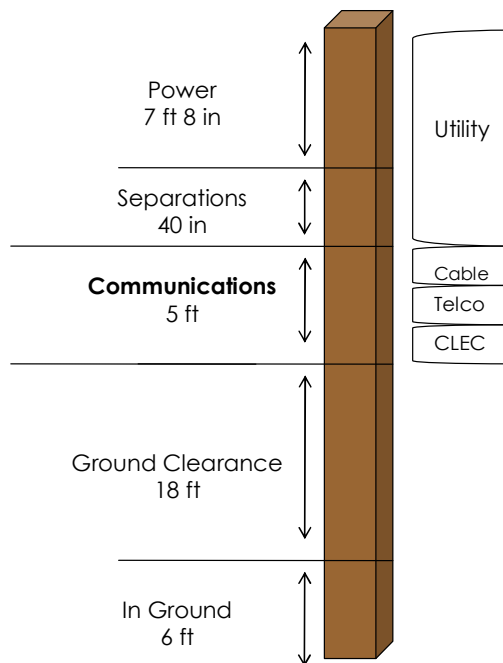
<sup>1</sup> See In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *Notice of Proposed Rulemaking*, 22 FCC Rcd 20195 (2007) ("NPRM").

A. Graphically Clarify Precisely Where On A “Typical” Pole That Wireless Connections May Occur

While substantial *verbiage* appears on the record as to where and under what circumstances parties suggest wireless equipment attachments make sense, the record appears thin in providing related *graphics*. The NPRM contains no such graphics, and the commenters generally avoided providing same. It is recommended that the *Order* resulting from the instant *NPRM* contain graphics. Graphic 1 displays the space allocations for a typical pole.<sup>2</sup>

Space Allocation on a Typical 40' Shared Utility Pole

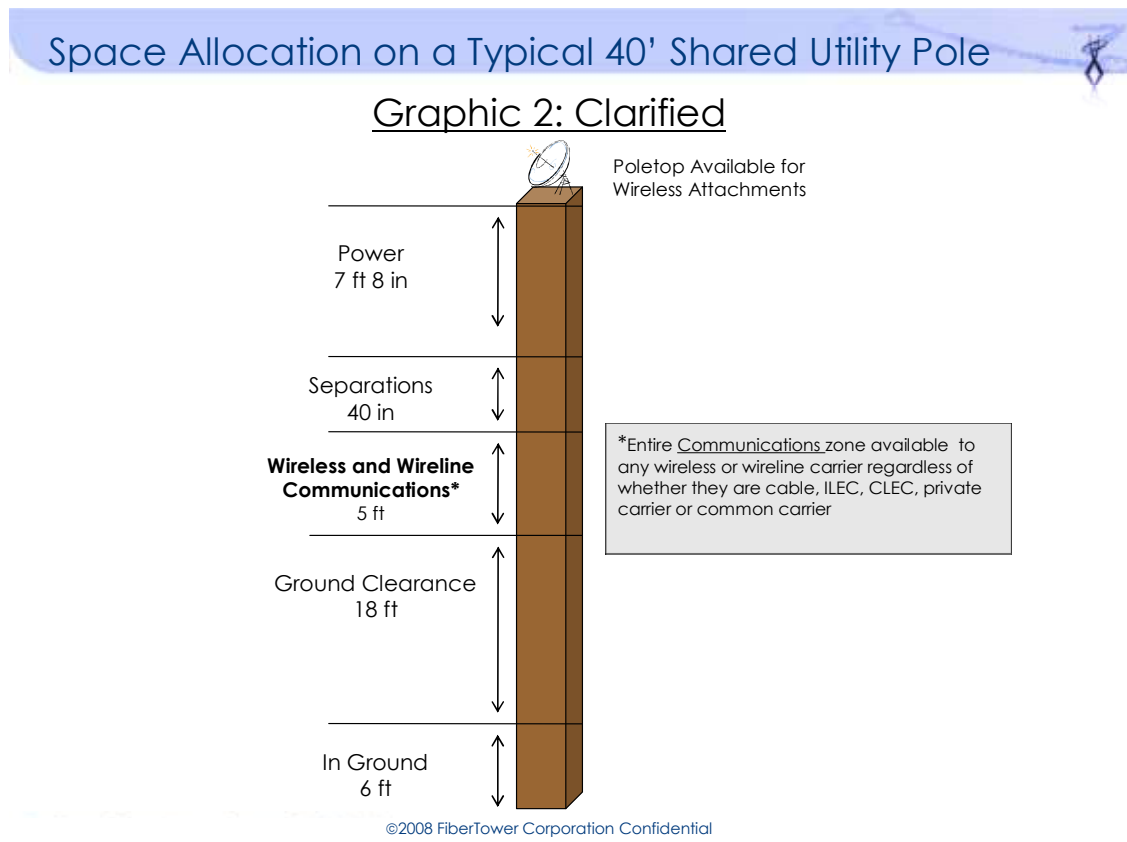
Graphic 1: Existing



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<sup>2</sup> See, e.g., In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments, *Second Report and Order*, FCC Docket No. 78-144, 72 FCC 2d 59, 1979 FCC LEXIS 374, at \*68, n.21. See also, In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *Comcast Corporation Comments*, Exhibit 2: Declaration of Harold W. Furchgott-Roth at p. 18. (filed Mar. 7, 2008) (“*Comcast Comments*”).

Graphic 2 provides a suggested *clarified* graphic that shows precisely where wireless connections are permitted or proposed as permitted on the same “typical” pole.



**B. Pole Attachments for Competitive Fixed or Mobile Wireless Networks Help Meet Government Standards for Physically Diverse Networks**

The record now contains data on how reasonable access to poles by competitive carriers assists federal customers in meeting federal standards for physically diverse network connectivity.<sup>3</sup> Poles represent a significant and material tool in allowing fixed

<sup>3</sup> See The Consolidated Appropriations Act, Fiscal Year 2005, Public Law 108-47, 118 Stat. 3260, Div. H, Title IV, § 414 (2004). See also, Office of Management and Budget, Memorandum for the Heads

wireless carriers to bring physically diverse networks into a market, or even a specific location, dominated by an incumbent. The federal government has identified fixed wireless as a technology use in its new GSA Networx contract.<sup>4</sup>

C. Blunt Harmful Monopoly Effects: Clearly Define the Terms and Conditions for Pole Access

The legislature, judiciary, and FCC all recognize monopoly control exists in the systems controlling poles, ducts, conduits, and rights-of-way.<sup>5</sup> These monopolies disfavor competition to the detriment of a free market economy, and also shortsightedly retard the federal network diversity and redundancy requirements.<sup>6</sup>

FiberTower agrees that the “current 224 process fails to impose discipline and accountability on pole owners”<sup>7</sup>. With non-pole owning carriers placed at a distinct disadvantage, this failure leads to alternative carrier reluctance to more fully engage the process, thus prompting customer disappointment, unnaturally extended build schedules, and market and coverage uncertainty or abandonment.<sup>8</sup> Weak bargaining power on the

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of Departments and Agencies, M-05-16 (June 30, 2005); and FEMA, Federal Preparedness Circular, FPC 65. See also, In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *FiberTower Corporation Comments* at p.4, fn.11 (filed Mar. 7, 2008)(“*FiberTower Comments*”).

<sup>4</sup> See *GSA Networx Program Update* by Lt. Gen. Charles E. Croom, Director, Defense Information Systems Agency, and Fred Schobert, Networx Program Manager, FAS Integrated Technology Services, (January 3, 2007) at Slide 18: [http://www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/2007FASNetworxProgramUpdate\\_R2BVF-h\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/2007FASNetworxProgramUpdate_R2BVF-h_0Z5RDZ-i34K-pR.pdf)

See also, *FiberTower Comments* at fn 5 and fn 6.

<sup>5</sup> See, e.g., S. Rep. No. 95-580 at 13 (1977); H.R. Rep. No. 95-721 at 2 (1977); 47 C.F.R. § 224; *General Tel. Co. of Southwest v. United States*, 449 F.2d 846, 851 (5<sup>th</sup> Cir. 1971).

<sup>6</sup> See The Consolidated Appropriations Act, Fiscal Year 2005, PL 108-47, 118 Stat. 3260, Div. H, Title IV, § 414 (2004).

<sup>7</sup> In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *Crown Castle Solutions Corp. Comments* at 2 (filed Mar. 7, 2008)(“*Crown Castle Comments*”).

<sup>8</sup> See generally, In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *FiberTech Networks LLC and Kentucky Data Link, Inc. Comments* at 4-11 (filed Mar. 7, 2008)(“*FiberTech/KDL Comments*”); In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s

part of the ILECs in negotiations with pole owners will adversely affect pole attachment capacity, and therefore the “vitality of competition to deliver telecommunications, video services, and broadband Internet access service”.<sup>9</sup>

Pole owners frequently delay and constrain competitors’ access to poles, ducts, and conduits. FiberTower supports national rules for establishing a clear and readily enforceable process that ensures ready access to poles, ducts, conduits, and rights-of-way, and others support this view. The existing complaint process has not proven effective in resolving common attacher complaints. Individual adjudication of pole attachment disputes have failed to induce pole owners to institute standardized, nondiscriminatory access to other carriers seeking attachments. This is particularly true for wireless-specific services. The record is replete with examples of unreasonable delays, restrictive policies such as prohibitions on pole-top antennas or boxing, and other violations in spite of frequent FCC intervention, leading to repeat litigation of the same issues.<sup>10</sup> More specific rules established by the Commission will allow open and consistent access policies.<sup>11</sup>

A number of states work to diminish monopoly control over poles by providing clear, enforceable pole access policies, and the FCC is encouraged to incorporate those examples. As one model, California precedent required utilities to finish make-ready

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Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *NextG Networks Inc. Comments* at 5-9 (filed Mar. 7, 2008) (“*NextG Comments*”); In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission’s Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *Time Warner Telecom Inc., One Communications Corp., and Comptel Comments* at 2-5 (filed Mar. 7, 2008) (“*Comptel Comments*”); *Crown Castle Comments* at 5-8.

<sup>9</sup> *NPRM* at ¶ 15.

<sup>10</sup> *See Crown Castle Comments* at 5 – 7; *NextG Comments* at 9-11; *FiberTech/KDL Comments* at 7-9; and *Comptel Comments* at 18-21.

<sup>11</sup> Relevant suggestions to this end include requiring timely performance of preconstruction surveys and completion of make-ready work (NextG); rebuttable presumption that NESC-compliant pole-top antennas are safe and may not be automatically prohibited (Crown Castle); providing CLECs reasonable access to building-entry conduit (FiberTech/KDL); permitting the installation of equipment boxes in “unusable” space (Next G); allowing pole boxing and extension arms (FiberTech/KDL, Comptel, TWTC, One).

work within 30 days for projects that encompass less than 500 poles or five miles of conduit.<sup>12</sup> Similarly, in the event a pole owner is unable to complete a pole survey or make-ready work in a timely manner, the New York PSC permits an attacher to directly hire a state-approved contractor to perform the work.<sup>13</sup> The Commission should promulgate rules that allow attachers more efficient and timely access to poles.

#### D. Enact a Unified Rate

FiberTower agrees with the Commission's tentative conclusion in the *NPRM*, and numerous supporting commenters, that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service.<sup>14</sup> We agree with TWTC and other commenters that all competitors should pay the cable formula rate.<sup>15</sup> This rate most appropriately allocates the costs between the pole owners and attachers and provides full compensation to the pole owners.<sup>16</sup> Pole attachment compensation under section 224 is designed to reimburse pole owners for their costs. Under current rules, telecommunications carriers pay a rate that can be two to three times

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<sup>12</sup> Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service, et al., Docket No. R.95-04-043, Decision No. 98-10-058, at 142 (Cal. PUC 1998)(*"CA PUC Pole Attachment Order"*). See also *Comptel Comments* at 28 and at 17 fn 29.

<sup>13</sup> *FiberTech/KDL Comments* at 26, citing Fibertech Petition Exhibit 3, New York Order.

<sup>14</sup> *NPRM* at ¶3 .

<sup>15</sup> See Letter from Time Warner Telecom Inc. to Marlene H. Dortch, Secretary, FCC, RM-11293, RM-11303 (filed Jan. 16, 2007)(*"TWC White Paper"*).

<sup>16</sup> The Commission's statement in the *NPRM* that the cable rate is "subsidized" and does not include an allocation of the cost of unusable space is not exactly correct; the cable formula includes an up front make-ready cost plus an annual rent covering its share of the pole, usable and unusable. See In the Matter of Alabama Cable Telecomm's Ass'n v. Alabama Power Co., Order, 16 FCC Rcd 12209 (2001)(*"Alabama Power Co."*) "Under the *Cable Formula*, the costs of unusable space are allocated based on the portion of usable space an attachment occupies, the space factor." Amendment of Commission's Rules and Policies Governing Pole Attachments, *Consolidated Partial Order on Reconsideration*, 16 FCC Rcd 1210t ¶53 (2001). "Cable attachers pay all the costs associated with the pole attachment, which are allocated based on the portion of usable space occupied by the attachment. The costs associated with the entire pole are included in that calculation....Under the *Telecom Formula*, pursuant to the specific requirements of the Pole Attachment Act, the costs of unusable space are separated from the costs of usable space and are allocated based on the number of attaching entities. The costs of usable space are still calculated based on the portion of usable space occupied." *Alabama Power Co.* at ¶¶ 60, 55.

higher than that for cable companies and substantially overcompensates utilities for attachments by assigning a disproportionate percentage of the cost of unusable space to telecom attachers. Eliminating the differential between the rates ensures the rates are truly nondiscriminatory as required by Section 224(e)(1).<sup>17</sup>

Further, Comptel notes that states exercising reverse preemption are tending to tread toward the unified rate for cable operators and telecommunications carriers.<sup>18</sup> Out of the 13 states that have adopted specific rate formulas, 11 have adopted a uniform rate.<sup>19</sup> Most of the states that have adopted a single rate established a rate formula similar to the federal cable rate formula and generally rejected the application of the telecommunications pole rent for broadband services, including Oregon, California, Alaska, Connecticut, New York, Michigan, Massachusetts, Vermont, and Utah.<sup>20</sup>

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<sup>17</sup> 47 C.F.R. § 224(e)(1).

<sup>18</sup> *Comptel Comments* at 7.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Comptel Comments* at 8, fn 7; *see also* In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments, WC Docket No. 07-245, *State Cable Associations Comments* at 23 (filed Mar. 7, 2008).

E. Conclusion

For all these reasons, FiberTower supports national guidelines for making poles accessible on reasonable, non-discriminatory terms to all communications industry participants. FiberTower requests that any further action on the *NPRM* be taken in a manner consistent with the comments set forth above.

Respectfully Submitted,

**FIBERTOWER CORPORATION**

**By:** \_\_\_\_\_/s/ \_\_\_\_\_

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